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No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC,
fka CREDIT SUISSE FIRST BOSTON LLC, *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BILLING PLAINTIFFS' BRIEF ON THE MERITS

CHRISTOPHER LOVELL
Counsel of Record
GARY S. JACOBSON
LOVELL STEWART HALEBIAN LLP
500 Fifth Avenue
New York, New York 10110
(212) 608-1900

Counsel for Respondents
Glen Billing, et al.

(Additional Counsel listed on signature page)

207020

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QUESTIONS PRESENTED

1. Have defendants, at the FRCP Rule 12(b)(6) motion stage, carried their burden to establish that Congress intended in the federal securities laws to immunize from plaintiffs' antitrust claims defendants' private business decisions to collude where:

(a) Congress enacted the federal antitrust laws and the federal securities laws in order to prohibit defendants' conspiratorial conduct; and

(b) Congress expressly provided in the federal securities laws that private plaintiffs' claims thereunder "shall be in addition to any and all rights and remedies at law or equity" that plaintiffs have.

2. (a) In pleading conduct that is prohibited by both the antitrust laws and the securities laws, must plaintiffs anticipate and negate the assertion of the affirmative defense of implied immunity?

(b) For purposes of pleading an antitrust conspiracy, is conduct that is prohibited by the federal securities laws entitled to more protection than conduct that is protected by the First Amendment to the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	ix
STATEMENT OF THE CASE	1
a. The Decision Held That The Challenged Conduct Has Always Been Unlawful Under The Securities Laws	3
b. The SEC Agreed	3
c. The United States Agrees	3
d. The Decision Found And The United States Agrees That Neither "Plain Repugnancy" Nor "Displacement" Immunity Is Present	5
SUMMARY OF ARGUMENT	6
STATEMENT OF FACTS	10
ARGUMENT	12
POINT I. Plaintiffs Satisfy The Correct Application Of This Court's Implied Immunity Test Set Forth By The Court Of Appeals	12
A. This Court's Standards For Implied Immunity	12

Contents

Page

1. The Antitrust Laws Are The Magna Carta of Free Enterprise And The Fundamental Commercial Legislation of the United States 12

2. Implied Repeal of the Antitrust Laws Is Strongly Disfavored, And Will Be Found Only Upon A "Convincing Showing of Plain Repugnancy" Between The Antitrust Laws And The Subsequent Statute With Respect To The Challenged Conduct 12

3. Even Where Plain Repugnancy Is Convincingly Shown, Immunity Will Be Implied Only To "The Minimum Extent Necessary" To Make The Subsequent Legislation Work 13

4. The Decision Faithfully Followed This Court's Well-Established Standards, Whereas Defendants Ignore Them 13

B. The Decision Correctly Described What "Convincing Showing Of Plain Repugnancy" Has Meant And Has Not Meant In This Court's Prior Applications Of Its Implied Immunity Standard 14

Contents

Page

1. The Relationship Of The Securities And Antitrust Laws With Respect To The Conduct At Issue In *Gordon* And *NASD* Is The Polar Opposite Of That Here 15

2. Pools 18

C. Congress Has Never Expressly Immunized Conduct In The Securities Markets From Antitrust Claims And, On The Contrary, Has Expressly Preserved "Any and All" Rights, Including Antitrust Claims, For Investors 19

D. This Court's Decisions Have Repeatedly Rejected Implied Antitrust Immunity Where The Antitrust And The Later Statute Have Consistently Prohibited The Specific Challenged Conduct 19

E. As The United States Has Consistently Recognized, There Is No "Pervasive Regulation" Immunity For The Challenged Conduct Here 21

POINT II. Defendants Have The Burden, In Order To Establish Their Implied Immunity Affirmative Defense At The Pleading Stage, To Show That Plaintiffs Can Prove No Set Of Facts Constituting A Non-Immunized Antitrust Claim 22

Contents

Page

POINT III. Plaintiffs Satisfy The United States' Incorrect Proposed Pleading Immunity Standard, Which Should Be Rejected 23

A. The United States' Proposed Immunity Standard Violates This Court's Procedural And Substantive Precedent 24

1. In Asserting That Protected Rather Than Prohibited Conduct Is Challenged Here, And In Speculating About "Inextricably Intertwined", The United States Violates Its Own Precedent, *Conley v. Gibson* 24

2. The United States' Standard Should Be Rejected Because It Gives Great Weight To A Lesser Purpose Of The Federal Securities Laws But No Weight To The Important Purpose .. 25

3. As This Court Re-Affirmed Last Month, Pleadings Need Not Anticipate And Negate Affirmative Defenses 25

4. The United States' Standard Should Be Rejected Because It Is Unsupported And Affords More Protection To Conduct That Is Unlawful Under The Securities Laws Than *Noerr-Pennington* Affords To Conduct That Is Protected Under The First Amendment 27

Contents

Page

5. The United States' Proposed Pleading Standard Stands On Its Head Decades Of Safe Harbor Decisions Which Consistently Prohibit The Conversion of Protected Activities Into Opportunities To Engage In Violative Conduct And Do Not Provide Heightened Pleading Protection 29

6. The United States' Proposed Pleading Standard Contravenes The "Minimum Extent Necessary" Aspect Of This Court's Immunity Test 30

7. The United States' Citation To *NASD* Is Inapposite 30

8. If *Twombly* Is Affirmed, The United States' Proposed Standard Should Be Rejected For This Further Reason .. 32

B. Plaintiffs Satisfy The United States' Proposed Immunity Pleading Standard 32

1. The Plaintiffs' Allegations Must Be Read In The Light Of The Multiple Regulatory Prosecutions Of Defendants' Laddering And Tie-Ins 32

Contents

Page

2. Defendants' Alleged Non-Syndicate Joint Conduct Permits An Inference Of Conspiracy 32

3. Just As Defendants' Tie-Ins And Laddering Were Not "Inextricably Intertwined" With Legitimate Syndicates So As To Prevent Proof Of Laddering And Tie-Ins Under The Regulatory Cases, They Will Not Be "Inextricably Intertwined" Now ... 35

C. Leave To Amend Should Be Granted .. 36

POINT IV. Plaintiffs Satisfy Defendants' Incorrect Antitrust Immunity Standard, Which Should Be Rejected 37

A. Defendants' Proposed New Antitrust Immunity Standard Is Incorrect 37

B. The Decision Correctly Rejected Defendants' Repeated Argument That Plaintiffs Challenge Underwriting Syndicates And, Therefore, Raise A Conflict Between The Securities And Antitrust Laws 41

C. Defendants' "Doubly Prohibited" Immunity Argument Fails 42

D. Defendants' Policy Arguments Are Inappropriate In This Forum And Wrong 43

Contents

Page

1. Treble Damages Are Compensatory Not Punitive 43

2. Antitrust Laws Or Restraint Of Trade Laws Have Been Beneficially Prosecuted Against Conduct In The Securities Markets For Centuries ... 44

3. Antitrust Prosecutions Of Conduct In The Securities Markets Have Promoted Capital Raising But Defendants' Deleterious Practices And Overcharges Have Chilled Capital Raising 48

CONCLUSION 49

TABLE OF CITED AUTHORITIES

Page

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Apex Oil Co. v. DiMauro, 822 F.2d 246 (2d Cir. 1987) 32

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Page

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Page

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Page

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Page

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Cited Authorities

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Page

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S. Rep. 73-792, 1934 WL 1289 18

STATEMENT OF THE CASE

A. Plaintiffs allege that, in violation of Section 1 of the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C. §1, the ten leading investment banks ("defendants")[1] made the private business decision to conspire as follows.

Defendants agreed to require customers to provide pools of orders to inflate aftermarket prices of Class Securities above their IPO prices by purchasing those securities immediately after the IPO at "laddered" or escalating prices. Defendants, at times, jointly negotiated with customers the amount of laddering orders they required. C ¶ 57; JA 29. Defendants jointly discussed amongst themselves the amount of laddering orders that would be required and the increase in securities prices. C ¶ 55; JA 28.

As a result of these pools of laddered orders, defendants were able to greatly inflate aftermarket prices above the IPO prices. C ¶ 8; JA13-14. The inflation was so large that, in aggregate and on average, it was 8.5 **times** as much as existed during the 1981-1996 pre-conspiracy period. *Id.*

In order to cash in on the unprecedented price inflation, defendants further agreed to impose an additional charge for their underwriting of Class Securities. C ¶¶ 1, 4(a) 6; JA 11, 12. This charge, in essence, was a kickback to defendants of portions of customers' profits made by purchasing IPO shares at the IPO price and then quickly re-selling such securities at the inflated aftermarket prices. *Id.*

Thus, plaintiffs allege that the ten largest investment banks conspired to require from customers tie-in consideration (the "anti-competitive charges") for allocations of shares of Class Securities and to inflate the aftermarket

---

1. The named defendants were the dominant underwriters of certain types of initial public offerings ("IPO") *e.g.*, technology companies that raise $20,000,000 or more in their IPO ("Class Securities"). Amended Complaint ("C") ¶¶ 1, 4(b), 7; C ¶ 1, 8; Joint Appendix ("JA") JA 11-13.

prices of those securities above the IPO price.[2] C ¶¶ 1, 4, 7; JA 11, 13.

All plaintiffs paid the inflated prices caused by defendants' conspiracy. C ¶ 13; JA 16-19. Many plaintiffs paid those prices directly to defendants. *Id.* Defendants' collusive behavior inflated their revenues, individually and collectively, by billions of dollars at the expense of plaintiffs and the proposed class. C ¶¶ 7-8; JA 13-14.

Since the filing of plaintiffs' complaint, many administrative claims have been made against and settled by various defendants relating to the foregoing types of conduct. *E.g.*, Petition Appendix ("Pet. App.") 2a, 116a-119a. Because this conduct is unlawful under the securities laws if engaged in individually, none of these findings has needed to consider collusion. None of these or any other proceedings has provided any recompense to investors who lost billions of dollars of capital allegedly due to defendants' collusive conduct.

B. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendants moved to dismiss plaintiffs' complaint based, among other things, on the affirmative defense that defendants' alleged conspiracy is impliedly immunized from antitrust claims by the federal securities laws.

The District Court held that implied immunity was an affirmative defense but dismissed plaintiffs' claims on this ground. The Court of Appeals for the Second Circuit vacated the dismissal and remanded. *See* Pet. App. 1a-71a ("Decision").

Defendants petitioned the Court for rehearing and rehearing *en banc*. Pet. App. 123a. They relied on two then-recent

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2. In an "underwriting," investment banks typically purchase from an issuer its initial public offering of stock at a price agreed upon with the issuer. The underwriters also agree with the issuer: (a) to charge an agreed-upon underwriters' discount representing the underwriters' disclosed compensation, and (b) to offer the entire issue of stock to the public at the sum of (1) the agreed-upon purchase price paid to the issuer, plus (2) the agreed-upon underwriters' discount and commission. This sum is the "IPO price." C ¶ 36; JA 24.

decisions of the Second Circuit Court of Appeals that had unanimously upheld immunity for these same defendants in connection with very different facts involving underwritings and stock options listings and executions. *In re Stock Exchange Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003); *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002).

Not one Judge of the Second Circuit voted for rehearing of the Decision or even for plaintiffs to respond to defendants' petition. Pet. App. 123a. That Court is located a few blocks from Wall Street and has repeatedly granted Wall Street antitrust immunity when such was consistent with this Court's precedent. But it found no merit to defendants' immunity arguments concerning the specific conduct here.

C. The detailed seventy-one page Decision confronted essentially three issues:

Issue #1: What is the status, under the federal securities laws, of a conspiracy among underwriters to require laddering orders to manipulate prices and kickback tie-in agreements in order to profit from inflated prices?

a. The Decision Held That The Challenged Conduct Has Always Been Unlawful Under The Securities Laws

The Court of Appeals found that plaintiffs had alleged an "epic conspiracy" by underwriters to inflate their underwriting charges and prices by agreeing to require laddering orders and tie-ins. Pet. App. 1a-3a. ("Plaintiffs tell a compelling story and are not the first to tell it").

Such laddering and kickback tie-in agreements are, the Court of Appeals held, prohibited under the federal securities laws. *E.g.*, Pet. App. 6a-16a, 62a-66a, 70a.

b. The SEC Agreed

The Securities and Exchange Commission ("SEC") has agreed, unanimously stating as follows:

> The **Commission has long considered** tying the award of allocations of offered shares to

> additional consideration to be fraudulent and manipulative, and **such practices have always been actionable under Section 17(a)** of the Securities Act [of 1933] . . .

(emphasis supplied). 2004 Proposed Amendment, 69 Fed. Reg. at 75,783 SEC Release 33-8851 (Dec. 9, 2004)("Release") at p. 15 *quoted* at Decision, Pet. App. 66a-67a.

Similarly, in response to questions by the Court of Appeals, the SEC stated:

> [t]he federal securities laws and the Commission's regulations generally prohibit market manipulation, including the types of tie-in and laddering agreements alleged in the complaints in these actions.

Pet. App. 188a-189a; *see* "d" below (defendants' challenged conduct is also prohibited by (Sections 9(a)(2) and 15 of the Securities Exchange Act, 15 U.S.C. §§ 78i(a)(2) and 78o).

c. The United States Agrees

Also in response to the Court of Appeals' questions, the Department of Justice ("DOJ"), stating that it was speaking on behalf of the United States, responded as follows:

> There is no dispute, however, that the securities laws and SEC regulations have long prohibited tying and laddering because of the serious threats such practices pose both to competition and to the proper functioning of the securities markets.

Pet App. 201a. The United States continues to take this position. Brief for the United States as Amicus Curiae Supporting Vacatur ("U.S. Brief") at 22-23 & n. 8.

Defendants argue that their deleterious conduct may be prohibited under the securities laws but is subject to on-going SEC line-drawing. Brief for Petitioners ("Brief") 14-15, 27-33.

Issue #2: Under the implied antitrust immunity precedent of this Court, is such a conspiracy to require laddering and tie-ins immunized by the securities laws from plaintiffs' antitrust claims?

d. The Decision Found And The United States Agrees That Neither "Plain Repugnancy" Nor "Displacement" Immunity Is Present

The Decision found that, in prior cases in which the affirmative defense of implied immunity was raised, this Court has required that defendants show either (a) "plain repugnancy" between the antitrust and securities laws with respect to the challenged conduct (Pet. App. 23a and 56a); or (b) "regulation of the challenged conduct that is so pervasive" that it ousts or displaces the antirust laws altogether. Pet App. 67a-70a.

The Decision found that neither form of implied immunity was present with respect to the challenged conduct here. Pet App. 62a-69a.

The United States also continues unequivocally to reject defendants' position that the securities laws oust the antitrust laws altogether. U.S. Brief at 8. Likewise, the United States continues to endorse the "repugnancy" immunity standard it argued to the Second Circuit: the "principal question [in implying immunity] is whether the conduct alleged in the complaint was 'expressly or implicitly approved by the securities laws or SEC regulations.'" U.S. Brief at 6, *quoting* Pet. App. 207a.

Here, the challenged conduct has never been expressly or implicitly approved and, on the contrary, has always been prohibited under the federal securities. Pet. App. 8a-16a, 64a-70a. Therefore, as the United States (now including the SEC) asserts, a conspiracy to require laddering and tie-ins is non-immunized conduct that is prohibited by the antitrust as well as the securities laws. U.S. Brief pp. 6-7, 22.

Defendants have not even attempted to meet their burden here by saying that they satisfy the implied antitrust immunity standard set forth in the Decision nor the substantive (non-pleading) immunity standard proposed by the United States. Brief *passim*. If this Court upholds the Decision's immunity test, as we believe it should, or the United States' substantive immunity test, then defendants' dismissal arguments fail.

Issue #3: What is the effect, if any, on the foregoing implied immunity analysis of plaintiffs' allegations that defendants abused their interactions during their joint venture underwriting syndicates by agreeing to require laddering orders to manipulate prices and tie-in agreements to profit from price increases?

The Decision found no relevance to the implied immunity test of the body of evidence to be used to prove the challenged conduct. Pet. App. 61a n. 47 (advising the District Court of its flexibility to exclude or admit each item of evidence, give limiting instructions, etc.).

The United States disagrees. It proposes a novel antitrust immunity pleading standard. For purposes of pleading antitrust violations, this standard would afford more protection to conduct that is prohibited by the federal securities laws than to conduct that is protected by the First Amendment to the U.S. Constitution. U.S. Brief at 9, 14-16. The United States proposes remand so that plaintiffs may re-plead to satisfy the novel standard. U.S. Brief at 27, 30.

Defendants disagree with the Decision and the United States. Defendants oppose any leave to amend. Brief at 49 n. 6.

SUMMARY OF ARGUMENT

A. The Decision determined that, if this Court's well-established immunity standards are applied to **the challenged conduct here** in the same way that those standards have been applied to the challenged conduct present in prior cases, then defendants' conduct is not entitled to immunity from the antitrust laws. *See* Argument Point I *infra*.

The United States and, unlike in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682 (1975) ("*Gordon*"), the SEC, both agree that, under this Court's well-established immunity standard, there is no immunity for the challenged conduct of a conspiracy of underwriters to require laddering and kickback tie-ins.

Congress has been well aware of the beneficial effects of prior antitrust prosecutions in the securities markets. These effects include saving investors billions of dollars, and

uncovering or prosecuting deleterious conduct that had gone unprosecuted. *See, e.g.*, November 19, 1998 Congressman John Dingell letter to the Attorney General and the Chairman of the SEC ("[W]here was the SEC? Why did the SEC allow things to deteriorate so badly?") ("Dingell"), available at *http://energycommerce.house.gov/comdem/press/105ltr99.htm.*

Thus, at the same time that Congress has abolished certain non-securities claims, it has continued its express preservations of any and all other claims, which include antitrust claims. *Compare* 15 U.S.C. § 78bb(f)(1)(A) (Securities Litigation Uniform Standards Act ("SLUSA") *with* 15 U.S.C. §§ 77p(a) and 78bb(a) (savings clauses).

Consistent with Congress' continued preservation of antitrust claims, this Court expressly held in *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) that antitrust immunity may be implied "only if necessary to make the Securities Exchange Act work". It is not "necessary to make the Exchange Act work" to license or immunize from antitrust prosecution an underwriter conspiracy to require laddering and tie-ins.

On the contrary, such conduct violates important prohibitions of the securities laws and contravenes their fundamental purposes (a) to protect investors against a loss of capital from such prohibited practices, (b) to provide remedies under the securities laws, and (c) to preserve remedies under other laws. *See* Securities Act § 17(a), 15 U.S.C. § 77p(a); Securities Exchange Act § 28(a), 15 U.S.C. § 78bb(a). *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 410 (1973) (Private Sherman Act antitrust action should proceed regardless of the Civil Aeronautics Board's involvement since the context of the Federal Aviation Act explicitly states "Nothing contained in this chapter shall in any way abridge nor alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Federal Aviation Act of 1958– 49 U.S.C. § 1506, recodified at 49 U.S.C.A. § 40120(c).)

Thus, as the United States (including the still-understaffed SEC) recognizes, the Securities Exchange Act will work **better** and Congress' purposes therein will be better achieved when antitrust claims "reach" and prosecute the deleterious, doubly-prohibited collusive conduct at issue here. *Compare* U.S. Brief at p. 22 *with* Securities Act § 9(a), 15 U.S.C. § 77i(a).

B. Defendants have the movants' burden on their FRCP Rule 12(b)(6) motion to demonstrate that, accepting plaintiffs' well-pled allegations as true and drawing all reasonable inferences in favor of plaintiffs, plaintiffs can prove no set of facts constituting a non-immunized antitrust claim. *See* Point II, *infra*.

Defendants have failed to make their case for any, let alone all, of their proposed changes in the immunity standard and the fact and law determinations here. If accepted, such changes would dangerously alter this Court's well-established immunity standard in at least two ways.

First, implied immunity could, for the first time, be justified because an evil is so deleterious that Congress prohibits it in two federal statutes and the regulator supplements the second prohibition with further prohibitions.

Second, more generally, the "Magna Carta" of American economic freedom, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 415 (2004), could be dissolved for a broad part of American commerce, *i.e.*, whenever active regulation is present. These changes would stand this Court's wise precedent on its head and, for example, end decades of salutary consequences for the securities markets arising from the applications of the antitrust laws to the securities markets under such precedent. *See* Pt. IV, *infra*. For this very reason, it may be inferred, Congress expressly preserves in the securities laws claims such as plaintiffs' antitrust claims.

In the latter regard, although defendants' policy arguments are not properly addressed to this forum, antitrust and restraint of trade claims have been repeatedly prosecuted to beneficial effect for two hundred years against deleterious conduct in the securities markets. Point IV, D, *infra*.

In its on-going oversight of the SEC, Congress has repeatedly recognized the beneficial aspects and incentives, checks and balances of having antitrust claims prosecuted. *See Dingell, supra*; October 5, 1993 statement of Rep. Markey (broad-ranging government investigations into **antitrust** violations and market manipulations demonstrated need for comprehensive reform of securities markets);[3] Sept. 4, 1991 Statement of Jerome H. Powell, Assistant Secretary for Domestic Finance, Department of the Treasury, Salomon Bros. and Government Securities: *Hearings Before the House Comm. On Energy and Commerce*, 102nd Cong. 110 (1991) ("Securities fraud and antitrust violations are more generally the enforcement responsibility of the self-regulatory regulations, the SEC and the Justice Department").

C. The new pleading standard of the United States wholly ignores the most important purposes of the federal securities laws, investor protection, and greatly elevates a lesser purpose[4], capital formation. *Pinter v. Dahl*, 486 U.S. 622, 653, 108 S.Ct. 2063, 2081-82, 100 L.Ed.2d 658 (1988) (courts should apply the securities laws flexibly to achieve the goal of investor protection). *See* Pet. App. 20a, n. 18.

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3. The statement is available at *http://thomas.loc.gov/cgi-bin/query/F?r103:5:./temp/~r103zFvqf3:e41375*.

4. Section 2(b) of the Securities Act provides:

> CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND
>
> CAPITAL FORMATION –
>
> Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

Securities Act § 2(b) (as amended by the National Securities Market Improvement Act of 1996 ("NSMIA"), Pub. L. No. 104-290, § 106(a), 110 Stat. 3416, 3424) (codified at 15 U.S.C. § 77b(b)).

Pursuant to Congress' investor protection purposes, joint action to raise prices above the IPO price is expressly prohibited, not permitted. *Sec* Pet. App. 12a-13a (SEC says Section 9a of Exchange Act is "heart" of Act). Plaintiffs allege that defendants "abused" their permitted meetings in order to engage in conduct prohibited by the heart of the securities laws. Under *Conley v. Gibson*, 355 U.S. 41 (1957), this allegation is to be accepted as true.

Given that "abuse" and unlawful conduct under the securities laws is what plaintiffs are alleging, the investor protection purposes dictate the opposite approach from that of the United States. In that, proper approach, defendants' syndicate activities alleged in the Complaint are fair game for antitrust conspiracy inferences to the extent the activities are unlawful under the federal securities laws because defendants "abused" (C ¶ 5A,116) such activities to require laddering to inflate prices and tie-ins to profit from price increases.

Further, the United States' pleading standard is contrary to this Court's affirmative defense, as well as its antitrust immunity, and antitrust evidence precedent. Arg. III, *infra.* Such novel standard provides more pleading protection to conduct that is prohibited by the federal securities laws than this Court's *Noerr-Pennington* doctrine provides to conduct that is protected by the First Amendment to the U.S. Constitution. *See* Arg, Pt. III; *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

STATEMENT OF FACTS

The anticompetitive effects of defendants' "epic" conspiracy included (1) causing customers to have to pay to the defendant banks an additional tie-in charge to obtain certain IPO shares (C ¶¶ 1, 70; JA 11, 32); (2) penalizing and forcing other underwriters to impose such extra charge and to abide by the dominant investment banks' agreement (C ¶ 58; JA 29); and (3) enabling defendants to increase their market share from 71% to 90% during the Class Period. C ¶ 38; JA 25.

Another intended anticompetitive effect of the alleged conspiracy was to place in defendants' hands pools of customer aftermarket orders to buy at escalating, "laddered" prices above the IPO price in each of the eight hundred-plus IPOs at issue here. C ¶ 4(b), 7; JA 12, 13. With these pools of buy orders, defendants' alleged conspiracy raised the aftermarket price spectacularly above the IPO price. C ¶ 8; JA 13.

For example, in the market existing before defendants' conspiracy from 1981 until 1996, the average price increase (sometimes called the "pop") on the first day of trading of equity IPOs was approximately **8%**. As the direct result and cumulative effect of Defendants' implementation of their anticompetitive agreement, the average price increase on the first day of trading in Class Securities during the Class Period, was in excess of **60%** and during 1999-2000, was in excess of **70%**. C ¶ 8; JA 13.

This increase of 8.5 times the non-conspiratorial first day "pop", benefited defendants enormously. The more that defendants' "epic" conspiracy could use these pools of laddered orders to raise the aftermarket prices **above the IPO price**, the greater the anticompetitive, tie-in charge defendants' conspiracy could extract from customers. C ¶¶ 42, 73, 74; JA 26, 32, 33.

Necessity and Motive To Conspire. Due to the nature and operations of a public exchange market, defendants had to and did "restrain" and inflate the prices of not just their transactions with their own customers. Defendants also had to inflate the prices of **all** transactions in the aftermarket for Class Securities in order to increase their conspiratorial charges and total kickback income. C ¶¶ 1, 43, 71; JA 11, 26, 32.

Only through their unlawful agreement were defendants able to combine their market power to exert sufficient influence to inflate all aftermarket prices of Class Securities, on average, 8.5 times as much as during the pre-conspiracy period. C ¶¶ 42-43, 47; JA 26, 27.

With full knowledge of the foregoing, defendants took the steps discussed in Point III B, *infra*.

Finally, though not necessary to sustain their conspiracy allegations, plaintiffs also allege that defendants had and "abused" (C ¶ 5) the "opportunity to make and manage their unlawful agreement" during defendants' frequent meetings and communications in connection with their underwriting syndicates. C ¶¶ 44, 44-54 generally; JA 25-27.

ARGUMENT

POINT I. Plaintiffs Satisfy The Correct Application Of This Court's Implied Immuity Test Set Forth By The Court Of Appeals

A. This Court's Standards For Implied Immunity

1. The Antitrust Laws Are The Magna Carta Of Free Enterprise And The Fundamental Commercial Legislation Of The United States

The "Sherman Act is, indeed, the Magna Carta of free enterprise". *Trinko*, 540 U.S. at 415, *citing* to *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) (*"Topco"*); *accord*, U.S. Brief at 1.

The antitrust laws "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of the fundamental personal freedoms." *Topco*, 405 U.S. 610; *see also Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 56 n. 19 (1982); *California Retail Liquor Dealers Ass'n*, 445 U.S. 97, 110-11 (1980).

2. Implied Repeal Of The Antitrust Laws Is Strongly Disfavored, And Will Be Found Only Upon A "Convincing Showing Of Plain Repugnancy" Between The Antitrust Laws And The Subsequent Statute With Respect To The Challenged Conduct

Express "exemptions from antitrust laws are strictly construed," *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973), and implied repeals of antitrust laws are "strongly

disfavored." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-351, 372 (1963) (antitrust laws seek to further "our fundamental national economic policy" of competition).

Antitrust immunity will be implied only upon a "convincing showing of plain repugnancy" between the antitrust laws and the subsequent statute. *Id. United States v. National Ass'n of Securities Dealers*, 422 U.S. 694, 720 (1975) ("*NASD*") ("convincing showing of plain repugnancy"); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682 (1975) ("*Gordon*"); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) ("*Silver*").

3. Even Where Plain Repugnancy Is Convincingly Shown, Immunity Will Be Implied Only To "The Minimum Extent Necessary" To Make The Subsequent Legislation Work

Even where "a convincing showing of plain repugnancy" has been made, immunity will be implied "only to the minimum extent necessary" to make the subsequent statute's regulatory scheme work. *National Gerimedical Hosp. & Gerontology Center v. Blue Cross*, 452 U.S. 378, 389 (1981); *Gordon*, 422 U.S. at 683-684; *Silver*, 373 U.S. at 357.

The objective is to reconcile "the operation of both statutory schemes rather than holding one completely ousted." *National Gerimedical*, 452 U.S. at 392; *accord* U.S. Brief at 1.

4. The Decision Faithfully Followed This Court's Well-Established Standards, Whereas Defendants Ignore Them

This Court's foregoing standards and precedent were faithfully quoted and followed by the Second Circuit in the opinion below. *E.g.*, Pet. App. 23a. In contrast, defendants do not mention the "to the minimum extent necessary", "implied repeal is disfavored", and "reconcile the operation of both statutes" aspects of this Court's immunity test. Brief, *passim*.

B. The Decision Correctly Described What "Convincing Showing Of Plain Repugnancy" Has Meant And Has Not Meant In This Court's Prior Applications Of Its Implied Immunity Standard

The Decision analyzed this Court's prior immunity decisions in great detail. Pet. App. 23a-41a. The Court of Appeals then reviewed its own extensive decisions in the area. *Id.* 42a-56a ("arduous" review of the law). The Court then described various aspects of the precedent:

(a) The case for implied immunity is weakest where, as here, private decision-making creates profit-oriented collusive conduct. *National Gerimedical*, 452 U.S. at 390; *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

(b) Mere extensive regulation, standing alone, does not justify implied antitrust immunity. *Id.*

(c) This Court's application of its "convincing showing of plain repugnancy" test for antitrust immunity has, in previous cases, required either

(i) that Congress mandated or approved in the regulatory statute the challenged conduct that was prohibited by the antitrust laws,

(ii) that Congress empowered the regulatory agency to mandate or approve the conduct that the plaintiff challenged **and** the agency **did** act to mandate or approve such conduct. (Pet. App. 32a) and

(iii) evidence of intent to repeal or immunize is present. Pet. App. 47a.

The Decision then applied this Court's "plain repugnancy" standard of antitrust immunity through the following:

(1) have the movants identified a potential conflict between the antirust laws and the securities law **with respect to the challenged conduct** (Pet. App 64a); and

(2) if so, have the movants pointed to any evidence that Congress intended to repeal the antirust laws with respect to

the challenged conduct? *National Gerimedical*, 452 U.S. at 389 ("To be sure, where Congress did intend to repeal the antitrust laws, that intent governs, but this intent must be clear."). *E.g.*:

> That determination [whether to imply immunity] is informed by considering (1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal. The mere power to 'permit' an act as not violating a regulatory mandate does not alone immunize that act.

Pet. App. 47a (footnote and citations omitted). The Court of Appeals found that the foregoing conditions were not satisfied as to defendants' private business decision allegedly to conspire to require laddering orders to inflate prices and require kick backs of the profits from inflated prices. Pet. App. 64a-71a.

1. The Relationship Of The Securities And Antitrust Laws With Respect To The Conduct At Issue In *Gordon* And *NASD* Is The Polar Opposite Of That Here

In coming to its conclusion, the Decision painstakingly analyzed *Gordon* and *NASD*. Pet. App. 30a-41a. It determined that the relationship between the federal securities and antitrust laws with respect to the conduct at issue in *Gordon* and *NASD* was the polar opposite of that here. Pet. App. 70a ("The claim of implied immunity in this case is, in many ways, unlike any we have seen.").

For example, the intended approval in the legislative history, the express authorization in the statute, and the subsequent regulatory authorization of the specific conduct at issue in *Gordon* (Pet. App. 31a-34a) and *NASD* (*id.* 36a-41a) are all the polar opposite of the intended **dis**approval, the statutory

prohibition and the subsequent consistent prosecution and prevention of the specific conduct at issue here.

In order to protect investors from the loss of their capital, Congress (a) statutorily prohibited the conduct here through Section 17 of the Securities Act, Section 9(a)(2) of the Exchange Act (the "heart" of that Act), Section 15o(c)-1 of the Exchange Act and other sections of the federal securities laws; (b) provided express remedies to investors therefor (*e.g.*, Section 9(a)(2) of the Exchange Act); and (c) preserved any and all "rights and remedies" of investors under non-securities laws. (Neither *Gordon*, *NASD*, *Friedman* nor *Exchange Options* consider the statutory preservation of claims.) The SEC, the United States and private investors have prosecuted this evil and it has been continuously prohibited since enactment.

In *Gordon*, unlike here, the type of conduct at issue did not cause or contribute to the stock market crash of 1929 or the Great Depression. On the contrary, in the legislative history, Congress found that the setting of commissions rates by exchange rule was benign and commonplace. Congress expressly authorized the SEC to approve (or disapprove) exchange rates fixing rates. 422 U.S. at 689. The SEC exercised this express authority and approved the exchange's rules fixing the rates. The brokers undertook the benign conduct of complying with the exchange rule.

In direct conflict with congressionally authorized SEC approval, civil plaintiffs sued two brokers and the exchange claiming that they conspired to fix rates. 422 U.S. at 691. This direct conflict with the securities laws' historical treatment of the conduct at issue and the other circumstances present, created a convincing showing of plain repugnancy between the securities laws and the antitrust laws with respect to such conduct. This repugnancy would have rendered Section 19 of the Exchange Act "nugatory" in the absence of implied immunity. *Id.*

Similarly, in *NASD*, the legislative history to several Congressional enactments within the securities laws showed that "bootleg competitors" and sharp practices in the secondary market for re-sales of mutual fund securities, made it desirable

to authorize prohibitions or restrictions on the operation of secondary markets for the re-sale of mutual fund shares. 422 U.S. at 709.

Congress did so. *Id.* at 709-10. Pursuant to this Congressional authorization, the SEC thereafter authorized and approved various conduct by the National Association of Securities Dealers ("*NASD*") to ban re-sale markets or portions thereof for mutual fund shares. The *NASD* members acted accordingly.

In direct conflict with the foregoing congressionally mandated and/or authorized SEC approval, the United States sued the *NASD* under the antitrust laws to void these congressionally desired restraints of trade. The United States also sought to enjoin the ancillary steps of the *NASD* and its members to effectuate these congressionally-desired objectives.

The Court, four justices dissenting, held that this direct conflict and the other circumstances present provided a convincing showing of plain repugnancy in two specific manifestations, and that the statutory scheme displaced the antitrust laws in a third instance regarding the conduct by the *NASD* and its members. 422 U.S. 710-712.

The circumstances for this limited displacement of the antitrust laws were that the *NASD* and its members were working to further the congressionally-desired customer protection measures under the securities laws designed to prevent abuses by eliminating or restricting re-sale markets. This conflicted with the antitrust laws but furthered the securities laws' investor protection purposes.

NASD, thus, presents the polar opposite of this situation. Here, defendants' private business decisions to conspire **violate** the heart of the securities laws and their consistent customer protection purposes. The challenged conduct has never been desired or approved by Congress or the SEC. Pet. App. 66a. Here, unlike *NASD*, the purposes of the federal securities laws and antitrust laws are consistent with respect to the conduct at issue. *Id.* 64a. Also unlike *NASD*, here the challenged conduct is contrary to both statutes and does not further the purposes of the securities statute. *Id.* 64a-67a.

2. Pools

The Decision also noted one of the main evils that caused the enactment of the federal securities laws and that has always been statutorily prohibited by those laws: the inflation of prices above the IPO price by the creation of "pools". Pet. App. 12a-13a; *see* H.R. Rep. 73-1383, 1934 WL 1290 (Leg. Hist.) at *10 ("As a matter of fact, **any pool** which seeks to bring about a change in the price of a security through manipulation is 'illegitimate' according to our definition . . .) (emphasis supplied).

> These operations were designed to give a fictitious appearance of activity to the market and to induce the public to purchase the stock **and thereby relieve the original syndicate of its commitment**. . . . The committee's record contains many examples of manipulation through the **medium of pools**. . . . Manipulative practices such as the foregoing are prohibited by the present bill, under heavy penalties.

(emphasis supplied). S. Rep. 73-792, 1934 WL 1289 (Leg. Hist.) at *8; *see* Section 9 of the Securities Exchange Act, 15 U.S.C. § 78i (prohibiting **joint** or individual action to "raise" prices). Here, the conduct goes far beyond what is required to violate Section 9. That is, the leading investment banks **agreed**, across underwriters and IPOs, to require pools of laddered orders that spectacularly inflated prices and to require tie-in agreements.

Congress expressly empowered actions by investors to enforce Section 9. Congress also provided

> the rights and remedies provided [in the securities laws]. . . shall be in addition to any and all other rights and remedies that may exist at law or in equity.

Securities Act § 16(a), 15 U.S.C. § 77p(a); *see also* Securities Exchange Act § 28(a), 15 U.S.C. § 78bb(a) (similar savings clause).

Plaintiffs' claims "at law" here are precisely such "other rights."

C. Congress Has Never Expressly Immunized Conduct In The Securities Markets From Antitrust Claims And, On The Contrary, Has Expressly Preserved "Any And All" Rights, Including Antitrust Claims, For Investors

Congress has been aware of the repeated, publicized antitrust prosecutions in the securities markets and their beneficial effects for investors and the markets. *E.g.*, *Dingell*, *Markey*, *Powell*, *supra*. Congress has not expressly exempted conduct in the securities markets from the antitrust laws even while it was terminating other non-securities law claims in these markets. *Compare* Pet. App. 70a *with* 15 U.S.C. § 78bb(f)(1)(A) (SLUSA).

On the contrary, at the same time that Congress eliminated certain non-securities law claims, it has otherwise continued to preserve "any and all rights and remedies that may exist at law or equity". 15 U.S.C. § 77p(a). Thereby, Congress preserved investors' well-established, publicized rights and remedies under the federal antitrust laws.

D. This Court's Decisions Have Repeatedly Rejected Implied Antitrust Immunity Where The Antitrust And The Later Statute Have Consistently Prohibited The Specific Challenged Conduct

Where, as here, the antitrust laws and the subsequent regulatory statute both prohibit the challenged conduct, this Court has repeatedly rejected antitrust immunity:

National Gerimedical Hosp. & Gerontology Center v. Blue Cross, 452 U.S. 378, 391, 393 (1981) (nothing in National Health Planning and Resources Development Act required defendant to refuse to deal and to conspire to deny plaintiff entry to relevant market, conduct prohibited by antitrust laws; immunity denied where "no specific conflict between the Act and the antitrust laws");

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (electric utility's monopolistic refusals to deal prohibited by

Sherman Act and Public Utility Holding Company Act, which included Federal Power Act; immunity would not be implied);

Carnation Co. v. Pacific Westbound Conference, 383 U.S 213, 216, 222 (1966) (no immunity for rate-making agreements which were not approved by the Federal Maritime Commission and which violated both the Sherman Act and the Shipping Act of 1916);

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 355 (1963) (no repugnancy where Congress passed Bank Merger Act with no intention of displacing enforcement of antitrust laws against pure stock acquisitions by banks and bank mergers);

Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 472 (1960) (acquisition of competitor to monopolize commerce in fluid milk in regional area prohibited by antitrust laws and Capper-Volstead Act; "We hold that the privilege the Capper-Volstead Act grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors.");

Georgia v. Pennsylvania R. Co., 324 U.S. 439, 458-59 (1945) ("we find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier," despite the fact that "the Commission has taken some action in that regard"); and

United States v. Borden Co., 308 U.S. 188, 204-05 (1939) (agreement fixing price and supply of fluid milk in Chicago area prohibited by Sherman Act and Capper-Volstead Act; collective marketing authority did not imply antitrust immunity for conspiracy to maintain artificial and non-competitive prices).

E. As The United States Has Consistently Recognized, There Is No "Pervasive Regulation" Immunity For The Challenged Conduct Here

Defendants argue that an alleged conspiracy of investment banks to inflate their underwriting charges and aftermarket securities prices by requiring tie-in or laddering transactions is immune from prosecution under the antitrust laws because Congress, in the federal securities laws, has generally displaced the antitrust laws. Brief at 18-19; *contrast* Pet. App. 69a.

The United States has made clear its position that "[t]he broad immunity urged by petitioners would improperly shield anticompetitive conspiracies that are distinct and separable from the permitted activities of an underwriting syndicate." US Brief at 9. The United States notes further that "[t]his Court has repeatedly rejected the view that all conduct regulated under another statutory scheme enjoys 'a blanket exemption' from antitrust law." *Id.*, *citing National Gerimedical*, 452 U.S. at 392.

The relevance of *Gordon*'s inquiry is not merely to find the "power to regulate" and its "active exercise," but to determine whether that power and its exercise have created conflicting regulatory mandates. The Second Circuit faithfully applied *Gordon* in evaluating and ultimately rejecting the implied immunity defense here. Pet. App. 33a-35a. The court of appeals correctly determined that *Gordon* concerned not, as defendants assert, the "potential for conflict," Brief at 25, 42, but the plain repugnancy of the SEC's long-exercised power to "fix" commission rates with the Sherman Act's prohibition of price fixing. Pet. App. at 32a-33a. The United States agrees with the Second Circuit's, not the defendants', reading of *Gordon*. U.S. Brief at 17. Plaintiffs satisfy the *Gordon* test.

For the same reasons, plaintiffs also satisfy the pervasive regulation standard articulated in *NASD*. Defendants mistakenly argue that this Court implied immunity in *NASD* on the strength of the SEC's assertion that failure to do so would leave its authority "seriously compromised." Brief at 26. Rather, this Court found in *NASD* that there could be "no reconciliation of

[the SEC's] authority" to permit restrictive agreements in the secondary market for mutual funds and "the Sherman Act's declaration that they are illegal *per se*." 422 U.S. at 729; Pet. App. 37a-38a. Again, the United States agrees with the Second Circuit's, not the defendants', reading of *NASD*. U.S. Brief at 18. Plaintiffs satisfy the *NASD* test, as the SEC now acknowledges, prosecution of the beneficial antitrust claims here will not "seriously" nor at all "compromise" the SEC's regulatory authority.

POINT II. Defendants Have The Burden, In Order To Establish Their Implied Immunity Affirmative Defense At The Pleading Stage, To Show That Plaintiffs Can Prove No Set Of Facts Constituting A Non-Immunized Antitrust Claim

On defendants' FRCP Rule 12(b)(6) motion, plaintiffs' well-pled fact allegations are accepted as true and all reasonable inferences are drawn in favor of plaintiffs. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Defendants have the movants' burden to establish that there is no set of facts on which plaintiffs can prove a non-immunized antitrust claim. *Id.*[5]

More generally, defendants have the burden to establish all other aspects of their affirmative defense of implied immunity. *Exchange Options*, 317 F.3d 150-151.

Defendants have not even attempted to satisfy their burden if the substantive immunity standard of the Decision and the United States is upheld. Of necessity, defendants' limited attempt to satisfy their burden rests on the acceptance of their new immunity test, applied to their (incorrect) version of the facts here.

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5. Plaintiffs have no burden. *Compare Thill v. New York Stock Exchange*, 633 F.2d 65, 67-69 (7th Cir. 1980) (after earlier reversal of a summary judgment that had granted implied immunity, 433 F.2d 262, a full trial was held after which implied immunity was found to be appropriate).

POINT III. Plaintiffs Satisfy The United States' Incorrect Proposed Pleading Immunity Standard, Which Should Be Rejected

The United States now adds an immunity **pleading** standard that it did not raise below.

> [t]he court [of appeals] should have recognized the immunity not only of collaborative activities that are specifically permitted under the securities laws, but also of those activities that are inextricably intertwined with permitted conduct.

U.S. Brief at 9.

* * * *

> In the context of this suit, therefore, the complaint's allegations must give rise to a reasonably grounded inference of an antitrust violation without relying on conduct that was authorized under the regulatory regime or inextricably intertwined with such immune conduct.

Id. at 23. This Court should not adopt this novel pleading standard that was not raised or considered below. *See* A *infra*. But plaintiffs have satisfied that standard. *See* B *infra*. Alternatively, as the United States proposes (U.S. Br. p. 30: "judgment . . . should be vacated and the case remanded"), remand and leave to replead should be ordered. *See* C *infra*.

A. The United States' Proposed Immunity Standard Violates This Court's Procedural And Substantive Precedent

1. In Asserting That Protected Rather Than Prohibited Conduct Is Challenged Here, And In Speculating About "Inextricably Intertwined", The United States Violates Its Own Precedent, *Conley v. Gibson*

The United States asserts:

> A complaint must allege facts that provide the defendant with concrete notice of the claims against it, *Conley v. Gibson*, 355 U.S. 41, 47 (1957), and give rise to a reasonably grounded belief that the plaintiff may ultimately be able to prove its claim, *see Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). In the context of this suit, therefore, the complaint's allegations must give rise to a reasonably grounded inference of an antitrust violation without relying on conduct that was authorized under the regulatory regime or inextricably intertwined with such immune conduct.

U.S. Brief at 23.[6]

Defendants' prohibited agreement was made and implemented, in part, through what plaintiffs allege are unlawful "abuses" of otherwise permitted syndicate conduct. C ¶ 5; JA 26. To characterize, as the U.S. does, the conspiracy as "inextricably intertwined" to **permitted** activities is to violate the rule of the very case that the U.S. cites, *Conley v. Gibson*. That is, the U.S. asserts facts that are contrary to the well-pled

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6. Contrary to the suggestion of the United States, this Court was not attempting in *Dura* to state a broad new pleading standard. The Court in *Dura* identified as one goal of the pleading rules to require "*a reasonably founded hope* that the [discovery] process will reveal relevant evidence." 544 U.S. at 347 (emphasis supplied). Nor, of course, did *Dura* consider evidence of permitted conduct in the proof of prohibited conspiracies.

allegations of the amended complaint, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Also, it fails to draw reasonable inferences in favor of the amended complaint. The risk of uncertainty in predictions about the future handling of this case is on defendants, not plaintiffs. *See* Point II *supra*.

2. The United States' Standard Should Be Rejected Because It Gives Great Weight To A Lesser Purpose Of The Federal Securities Laws But No Weight To The Important Purpose

Properly considered under the federal securities laws, defendants' alleged efforts (including in syndicates) to require laddering and tie-ins are prohibited activities (not protected ones). The "heart" of the Exchange Act, Section 9(a)(2), was enacted to prohibit a syndicate or others from doing what defendants allegedly did here. Pet. App. 12a-13a.

In this context, the United States' proposed pleading standard gives great weight to a lesser purpose of the federal securities laws (raising capital, including in syndicates) but no weight to the fundamental purpose of the federal securities laws (protecting investors from, among other things, underwriters' abuses).

3. As This Court Re-Affirmed Last Month, Pleadings Need Not Anticipate And Negate Affirmative Defenses

Requiring a heightened pleading standard to negate an anticipated affirmative defense contravenes decades of this Court's jurisprudence, as confirmed only last month by this Court's unanimous decision in *Jones v. Bock*, No. 05-7058 (filed Jan. 22, 2007) (affirmative defense of failure to exhaust administrative remedies need not be anticipated in complaint; "Courts should generally not depart from the Federal Rules' usual practice based on perceived policy concerns").

Implied immunity is an affirmative defense and defendants have failed to raise any error regarding the lower court's holding to this effect.[7]

When considering affirmative defenses based upon various types of immunity, this Court has repeatedly made clear that: "a claim of immunity is conceptually distinct from the merits of plaintiff's claim". *Mitchell v. Forsyth*, 472 U.S. 511, 527-28 (1985); *see also Gomez v. Toledo*, 446 U.S. 635, 640 (1980) ("Moreover, this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question"); *Barry Aviation Inc. v. Land O'Lakes Municipal Airport Comm'n*, 377 F. 3d 682, 688 (7th Cir. 2004) ("Complaints need not anticipate defenses"); *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F. 3d 899, 901 (7th Cir. 2004) ("Complaints need not contain any information about defenses and may not be dismissed for that omission").

This Court has also consistently "refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense."[8] *Crawford-El*, 523 U.S. at 595; *see also Gomez v. Toledo*, 446 U.S. at 640 ("Since qualified immunity is a defense, the burden of pleading it rests with the

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7. Here the District Court treated petitioners' assertion of implied immunity as "an affirmative defense that appears on the face of the complaint, and as such is properly addressed at the motion to dismiss stage." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 167 (1993), *quoting Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985). *In re IPO Antitrust Litig.*, 287 F. Supp. 2d 497, 501-02 (S.D.N.Y. 2003), App. 77a; *see also In re Exch. Options Trading Antitrust Litig.*, 317 F. 3d 134, 150 (2d Cir. 2003) (same).

8. This Court has also long refused to require heightened pleading standards in addition to the express instances required by Rule 9(b) of the Federal Rules of Civil Procedure. Any such requirement "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

defendant [citations omitted]. . . . We see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith").[9]

4. The United States' Standard Should Be Rejected Because It Is Unsupported And Affords More Protection To Conduct That Is Unlawful Under The Securities Laws Than *Noerr-Pennington* Affords To Conduct That Is Protected Under The First Amendment

Tellingly, the United States still cites to no case where the formation of a prohibited conspiracy during permitted meetings has barred a claim as a matter of law. U.S. Brief *passim*. Nor has the U.S. cited to a case that has held permitted activity to be "inextricably intertwined" with the prohibited activity so as grant a motion to dismiss. *Id.*

Lacking case support for a requirement that conduct that is supposedly "inextricably intertwined" with protected conduct be deleted from the complaint, the United States attempts to analogize its new pleading standard to what it calls "*Noerr-Pennington* immunity," which it argues may extend to injury that is itself an "incidental effect" of protected activity. U.S. Brief at 14, *citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 142-43 (1961); *see also United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965).

Noerr held that the Sherman Act did not apply to "activities of the railroads at least insofar as these activities comprised mere solicitation of government action with respect to the passage and enforcement of laws." *Noerr*, 365 U.S. at 138. As

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9. *See also Thomas v. Independence Township*, 463 F. 3d 285, 293-94 n.2 (3d Cir. 2006) ("As stated in *Gomez* and reaffirmed in *Crawford-El*, the burden of pleading qualified immunity rests with the defendant, not the plaintiff. . . . Because we conclude that plaintiffs have no duty to plead allegations in anticipation of a qualified immunity defense, we rather easily conclude that plaintiffs do not have the concomitant duty to do so with particularity").

Justice Black noted, the antitrust challenge in *Noerr* was to "[t]he right of petition . . . one of the freedoms protected by the Bill of Rights. . . ." *Id.* The First Amendment has long been described as the very foundation of constitutional government:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.'

New York Times Co. v. United States, 403 U.S. 713, 719-20 (1971) (Black, J., concurring), *quoting De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (Hughes, C.J.).

However, first, the United States does not attempt to argue that even the underwriters' **legitimate** syndicate behavior is protected activity on an equal footing as Constitutional free speech. U.S. Br. *passim*. Second, plaintiffs challenge only defendants' prohibited abuse, not their legitimate use, of syndicates. Conduct to make or carry out a conspiracy to require laddering and tie-ins, is prohibited, not protected, by the securities laws. Third, the U.S. standard would provide heightened pleading protection to the conduct that is unlawful under the securities laws when that pleading protection has not been provided to First Amendment activity.

5. The United States' Proposed Pleading Standard Stands On Its Head Decades Of Safe Harbor Decisions Which Consistently Prohibit The Conversion Of Protected Activities Into Opportunities To Engage In Violative Conduct And Do Not Provide Heightened Pleading Protection

The United States' novel pleading standard is contrary to numerous safe harbor and evidentiary decisions by this Court and other courts. **Without requiring** heightened pleading protection, these decisions have established and upheld the proposition that otherwise permissible steps under the antitrust laws may not be abused in order to enter into or carry out a prohibited conspiracy.[10]

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10. *See United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (fact that defendants used other conduct permitted under regulatory scheme to engage in conduct prohibited under the regulatory scheme and the antitrust laws would not provide ground for claiming immunity); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (fact that defendants were members of a stock exchange and thereby empowered to communicate with each other to create rules and by-laws governing their relations with the public and with each other was never advanced as a basis for finding applied immunity for alleged anticompetitive collective action in promulgating certain rules); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 379 U.S. 690, 707 (1962) ("it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme [citations omitted]"); *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F. 3d 781, 784-85 (7th Cir. 1999) (cooperative behavior would be permitted under trade association auspices or otherwise and under the antitrust laws provided behavior does not reduce competition among participants); *Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc.*, 253 F. Supp. 2d 262, 267 (D. Conn. 2003) (in case involving alleged collusion to fix prices of certain staple products that were components of a federally regulated formula for minimum milk prices, implied immunity did not apply where plaintiff's challenge was not to the federal milk pricing formula but rather to the defendants' conduct in manipulating the underlying components of the formula); *see also* VII P. Areeda & H. Hovenkamp, ANTITRUST LAW, Section 1477 at 315 (2d ed. 2003).

(Cont'd)

As with other prohibited conspiracies, this one may be formed or implemented through means that are themselves lawful or unlawful. *E.g.*, *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) (Posner, J.).

6. The United States' Proposed Pleading Standard Contravenes The "Minimum Extent Necessary" Aspect Of This Court's Immunity Test

The United States' new proposed standard is, in this context at least, contrary to decades of this Court's substantive immunity precedent. As the United States expressly told the Second Circuit, the fundamental importance of the antitrust laws requires that implied immunity be disfavored, such that "even where conflicts between the antitrust laws and regulatory scheme warrant immunity as to some allegations of the complaint," immunity may be implied "only to the minimum extent necessary." Pet. App. 202a, *citing Silver*, 373 U.S. at 357.

7. The United States' Citation To *NASD* Is Inapposite

The United States' citation to *NASD* is inapposite for many reasons, including because the "ancillary" activity there was congressionally-desired activity which protected customers and also furthered the purposes of the securities law. Here, the "ancillary" activity - - - agreeing to require laddering and tie-ins - - - is prohibited by the federal securities laws and defeats their purposes. In *NASD*, Congress and the SEC mandated the restraints of trade and the NASD and private parties implemented the mandate in an "ancillary" or more than ancillary way. Here, private business decisions chose to convert permitted (not mandated) joint activity into unlawful behavior and, indeed, allegedly joint unlawful behavior.

(Cont'd)

Furthermore, questions of immunity cannot be treated as rules of evidence that exclude proof of an unlawful conspiracy. While such evidence can be excluded under Fed. R. Evid. R. 403 if confusing or unduly prejudicial, there is no blanket rule of inadmissibility. *See In re Brand Name Prescription Drugs*, 186 F.3d at 789.

In *Phonetele, Inc. v. AT&T Co.*, 664 F.2d 716 (9th Cir. 1981) then-Judge Kennedy distinguished *NASD* as involving anticompetitive practices which had been permitted by Congress. *Id.* at 729 n. 35. His analysis of *NASD* recognized a common-sense test for determining when prohibited conduct was sufficiently related to permitted conduct to be "derivatively immune" from antitrust liability.

In *NASD*, the government had charged both vertical and horizontal anticompetitive activity in agreements to fix prices and restrict sales of mutual funds in secondary market transactions between dealers, between investors and dealers, and between investors. 422 U.S. at 701. The *NASD* Court concluded that the vertical restraints were immune from antitrust challenge as having been explicitly contemplated by statute, and then turned to the challenged horizontal activity. As Judge Kennedy noted in *Phonetele*:

> Count I of the Government's complaint alleged a horizontal conspiracy between NASD and its members to prevent the growth of a secondary dealer or brokerage market for mutual fund shares by means of anticompetitive interpretation and extension of NASD rules. *Id.* The vertical agreements could not have been implemented without some form of concert, *i.e.*, rulemaking and rule enforcement. Thus the defendants' horizontal conduct was *logically necessary to carry out the legitimate agreements and the sanctioned vertical restraints, if not directly responsive to a regulatory command.* Therefore the Court reasoned the concerted activity acquired a kind of derivative immunity by virtue of its relation to the immune restraints implemented by the concerted action.

664 F.2d at 729 (footnote omitted). Unlike the "ancillary" conduct in *Phonetele*, defendants' conspiracy here was not "logically necessary to carry out the legitimate agreements" and it definitely was not "directly responsive to a regulatory command."

8. If *Twombly* Is Affirmed, The United States' Proposed Standard Should Be Rejected For This Further Reason

The pleading standard proposed by the United States appears to be based on the position it has taken in a case pending before this Court styled *Bell Atlantic Corp. v. Twombly*, No. 05-1126. If the pleading standard proposed by the United States is rejected in *Twombly*, it should be rejected here as well.

For all the foregoing reasons, this Court should reject the United States' proposed pleading standard. However, if the Court determines to apply such standard, then plaintiffs demonstrate below that the allegations of their complaint **already** satisfy such standard.

B. Plaintiffs Satisfy The United States' Proposed Immunity Pleading Standard

1. The Plaintiffs' Allegations Must Be Read In The Light Of The Multiple Regulatory Prosecutions Of Defendants' Laddering And Tie-Ins

Numerous administrative enforcement proceedings referred to by the defendants (Brief at 14-15) and the Court of Appeals (Pet. App. 1a-2a), strongly indicate that defendants, individually, engaged in parallel, highly unusual and unlawful conduct. *E.g.*, *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987) ("Parallel conduct can be probative evidence on the issue of whether there is an antitrust conspiracy.").

2. Defendants' Alleged Non-Syndicate Joint Conduct Permits An Inference Of Conspiracy

In this context, plaintiffs have alleged conduct actionable under the antitrust laws which is not intertwined at all, let alone "inextricably intertwined", with legitimate syndicate conduct.[11] *E.g.*:

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11. The United States does not define "inextricably intertwined," although it asserts that implied immunity should extend to "conduct that is directly related to and cannot practicably be separated from permissible conduct, whether or not that inextricably intertwined conduct itself is authorized under the securities laws." US Brief at 12-13.

• In furtherance of the conspiracy, defendants **jointly** informed customers of the laddering and tie-in terms. C ¶ 57, JA 29. Here, defendants are jointly engaging in unlawful conduct. It has nothing to do with a syndicate much less with the legitimate purposes of a syndicate. (Also, if a syndicate's purpose is to assemble market power, and use that power as a lever to require laddering transactions, then the syndicate members are operating unlawfully under the federal securities laws to this extent.) *See Eastman Kodak v. Image Technical Services, Inc.*, 504 U.S. 451, 468-69 (1992).

• Defendants, at times, discussed with one another the amount of laddering to require and the resulting impact on prices. C¶¶ 55-56. JA 29. This, also, is neither syndicate activity nor in any way activity that is protected under the securities laws.

• Defendants monitored their customers' trade activities to ensure that the customers were paying the anticompetitive charges from one IPO to the next, and thus tracked each other's compliance with their unlawful agreement. C ¶ 62-63, JA 30-31. This is jointly implementing an agreement to require laddering - it, too, does not involve syndicate activity and finds no protection under the securities laws. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 663 (7th Cir. 2002) (principal manufacturers' monitoring one another's conduct by an "understanding" that they would not undercut the other, supported inference).

• Defendants collectively monitored each other's compliance with the unlawful agreement. *Id.* C ¶¶ 52, 56, JA 27-28. This monitoring and defendants' unlawful agreement are both reflected in defendant Credit Suisse's public statement made shortly after this case was commenced. Credit Suisse stated that its practices in allocating IPOs were consistent with the practices of other underwriters and that, if there was a problem, it was not a Credit Suisse problem but a Wall Street problem. C ¶ 63, JA 31.

• Only through their unlawful agreement were defendants able to combine their market power to exert sufficient influence to inflate all aftermarket prices of Class Securities, on average, 8.5 times as much as during the pre-conspiracy period. C ¶¶ 42-43, 47, JA 26, 27. Thus, the impact of defendants' agreement and activity both increased their market power and better enabled them to increase aftermarket prices.[12] C ¶ 8, JA 13-14. *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 25 (2d Cir. 1985) (conspiracy more plausible because defendants sought to move prices of an entire market).

• Individual employees of defendants continued to implement the aims of the conspiracy after moving to similar positions with other defendants. C ¶ 59, JA 30. This ex-syndicate allegation, obviously, also involves activity that is not protected under the federal securities laws.

None of the foregoing alleged conduct is "inextricably intertwined" with syndicates or legitimate book-building activities. Rather, each is readily separable from permitted underwriting activities. Even eliminating from consideration defendants' abusive syndicate communications alleged in the complaint, an inference of conspiracy is justified based on the foregoing allegations. Defendants individually engaged in highly unusual, unlawful and parallel conduct that they sometimes jointly imposed on customers. Defendants monitored their compliance with the agreement and are effectively admitted (by Credit Suisse) not only to have known what one another was

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12. More generally, plaintiffs allege:

• Defendants agreed to require customers to pay anticompetitive consideration for IPO shares based on a kickback or "percentage of the customers' profits from the purchase of the IPO shares". C ¶¶ 6, 42; JA 12-13, 26. This behavior is statutorily prohibited by the federal securities laws. *See* Statement of Case, pp. 3-5; and fn.13, *infra*.

• Defendants agreed to require customers to make aftermarket purchases of the Class Security at prices above the IPO price, a practice known as "laddering." C ¶¶ 7, 42; JA 13, 26. This behavior is extremely deleterious and statutorily prohibited by the federal securities laws. *See* Statement of Case, pp. 3-5; and fn.13, *infra*.

doing but to have known that one another was doing the same thing.

Accordingly, plaintiffs have adequately stated a non-immunized Section 1 claim against defendants even under the novel pleading standard now proposed by the United States.

3. Just As Defendants' Tie-Ins And Laddering Were Not "Inextricably Intertwined" With Legitimate Syndicate So As To Prevent Proof Of Laddering And Tie-Ins Under The Regulatory Cases, They Will Not Be "Inextricably Intertwined" Now

The parallel enforcement proceedings referred to by the defendants (Brief at 14-15) and the district court (Pet. App. at 117a-118a & n. 28) are ample evidence that the conspiratorial activity challenged here is capable of being separated from permitted conduct and proven in litigation. And the U.S. concedes that unlawful activity that is not "inextricably intertwined" with protected activity may be considered for purposes of a pleading inference of conspiracy.

Plaintiffs have alleged the following conduct that occurred in connection with a syndicate but clearly is separable from the syndicate and not protected by the federal securities laws:

• Defendants agreed to monitor the levels of participation by non-defendant underwriters in a given syndicate and to reward those underwriters from deal to deal for their adherence to the tie-in agreement, regardless of the identity of the lead underwriter. C ¶ 58; JA 29-30. This is jointly requiring laddering or tie-ins. *In re High Fructose Corn Syrup Antitrust Litig.*, *supra*. This behavior finds no protection under the securities laws.

• Defendants jointly failed to disclose their anticompetitive charges and laddering in the prospectuses for Class Securities. C ¶6,JA12. This is **not** protected activity.

• By reason of their unlawful conspiracy, defendants' market share grew during the Class Period from 73% of the total dollar amount of all equity underwritings and 71% of technology-

related underwritings to about 87% and 90%, respectively. C ¶ 38; JA 25.

• Defendants centralized their pools of laddered orders in one defendant's hands to drive up prices above the IPO price more effectively. C ¶ 52; JA 28. Conduct which is protected loses its protected character when it is abused for unlawful purposes.

Considering these additional allegations, the inference of conspiracy raised by plaintiffs' allegations is yet stronger.

C. Leave To Amend Should Be Granted

Should this Court determine to adopt the United States' new pleading standard, and should this Court find plaintiffs' allegations "inextricably intertwined" or lacking in any way, then the Court should permit plaintiffs leave to replead. *Compare*, U.S. Brief at 27, 30 (this case should be remanded for further proceedings) *with Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 348 (2005) (after clarifying pleading standards for securities fraud claims and finding plaintiffs' complaint "legally insufficient," the Court nonetheless remanded the case for "further proceedings consistent with [that] opinion."); *Crawford-El v. Britton*, 951 F.2d 1314, 1322 (D.C. Cir. 1991) (remanding to the district court for plaintiff to amend his complaint where complaint deemed insufficient to meet intervening precedent changing pleading standards); Fed. R. Civ. P. 15(a) (leave to amend a party's pleading "shall be freely given when justice so requires").

The many enforcement proceedings and five years of investigation that have occurred since the filing of plaintiffs' complaint permit plaintiffs to allege many further facts complying with the United States' novel standard. These facts show highly unusual, parallel and sometimes joint behavior. This behavior could best be accomplished by and is more probably the result of agreement.

POINT IV. Plaintiffs Satisfy Defendants' Incorrect Antitrust Immunity Standard, Which Should Be Rejected

In order to try to carry their movants' burden, defendants

(1) delete important, beneficial elements of this Court's traditional immunity analysis, *e.g.*, "to the minimum extent necessary", "implied repeal is disfavored", and "reconcile the operation of both statutes"; (*see* IA4, *supra*).

(2) inject unprecedented, inappropriate considerations into the immunity analysis, *e.g.*, *Trinko*'s test for whether to recognize a new duty of a monopolist to aid competitors;

(3) change or dispute the legal and factual circumstances determined to exist here by the Court of Appeals and the United States; and

(4) advocate major policy changes based on fact assertions that are not appropriately resolved in this forum and, moreover, are contrary to important Congressional purposes in both the securities and antitrust laws.

A. Defendants' Proposed New Antitrust Immunity Standard Is Incorrect

Injecting *Trinko*'s "new claim" analysis into and deleting traditional elements (*see* IA4, *supra*) from this Court's immunity analysis is improper. In essence, the plaintiffs in *Trinko* wanted to create a novel antitrust monopoly claim based on the Petitioners' alleged failure to provide sufficient aid to its own competitors. 540 U.S. at 411. Thus, competing with one's competitors - conduct that was previously encouraged by the antitrust laws - was challenged in *Trinko*. *Id.* This Court reasoned in *Trinko*:

> (a) that The Sherman Act is indeed the "Magna Carta" of free enterprise", *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 31 L.Ed. 2d 515 (1972) 540 U.S. at 415-416;
>
> (b) but "we do not believe that traditional antitrust principles justify adding the present case to the few

existing exceptions from the proposition that there is no duty to aid competitors". 540 U.S. at 411;

(c) that the duties imposed on incumbent local exchange carriers ("LEC") by the Telecommunications Act did not justify a modification of traditional (no duty to aid competitors) principles in part because Congress expressly provided that "nothing in this Act or the amendments made by the Act shall be construed to **modify** . . . the antitrust laws". [emphasis supplied] (*Id.* 406); and

(d) there were particular complications to a Section 2 monopoly claim (that do not apply to Section 1 claims) that help make the costs of recognizing a new claim greater than the benefits.

This Court also relied on the difficulties of proving a Section 2 monopoly claim which are not present in a Section 1 conspiracy claim. *Id.* at 411-12. Regarding the monopoly claim, conspiracies are more dangerous than individuals acting unilaterally because the concerted cooperation makes it more likely that the illegal conduct will be achieved. *See* 6 AREEDA & HOVENKAMP ¶ 1402a1, at 9 (2d ed. 2003)("Cooperation increases the risk of anticompetitive action and results, expands market power, creates an anticompetitive restraint not otherwise possible, and surrenders important decision-making autonomy on a matter of competitive significance."); ¶ 1402a4, at 10 ("While the unilateral creation of market power is a costly and risky enterprise, colluders can create it in a single meeting."); *Mobil Oil Corp. v. Blanton*, 471 U.S. 1007, 1008 (1985) (Unilateral conduct is far less likely to pose a threat to competition than concerted action); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-769 (1984)(same). Defendants try to justify their alterations in the immunity analysis based on the

supposed differences between the antitrust and securities laws. Contrary to defendants' arguments, the securities laws are not the flexible friend and the antitrust laws are not the threatening monolithic enemy of the specific conduct here.

From its original consideration of what became the securities laws, to its express language in the enactment of those laws, to its re-enactment of those laws and ongoing oversight of the SEC for seventy-plus years, Congress has always statutorily prohibited individual or joint efforts of underwriters to raise prices above the IPO price and tie-ins kickbacks to profit from such increases. Pet. App. 14a, 66a-67a; *see* Statement of Case, *supra*.

Contrary to defendants' argument, the SEC has **not** "actively regulated" the conspiratorial conduct here because such conduct has always been "out of bounds", **not** subject to SEC line drawing, and statutorily prohibited. But the SEC, along with the United States and private parties, has always prosecuted this precise conduct in order to enforce Congress' prohibition thereof. In sum, in order to protect investors, Congress has always statutorily prohibited the particular challenged conduct here in the securities laws.

In contrast, the antitrust laws may permit joint ventures.[13] Indeed, the antitrust laws further permit even "ancillary restraints" by joint venturers if such restraints are pursuant to the legitimate purposes of the joint venture and serve to increase output, benefit customers, and promote efficiency. *E.g.*, *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 20 (1979) (blanket music license not subject to per se treatment because it "accompanies integration of sales, monitoring and enforcement against unauthorized copyright

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13. *See* April 2000 *Antitrust Guidelines for Collaborations Among Competitors*, issued by the Federal Trade Commission and the U.S. Department of Justice, available at *www.ftc.gov/os/2000/04/ftcdojguidelines.pdf* ("Guidelines") at 3, 6.

use" which would present problems and expense if left to individuals). Spreading and diversifying risk, increasing efficiency in "building the book", and efficiently preparing for the prospective distribution of the shares may all be legitimate purposes under the antitrust laws of a joint venture underwriting syndicate. So is the ancillary restraint of jointly setting and adhering to the IPO price.[14] *See Texaco Inc. v. Dagher*, ___ U.S. ___, 126 S. Ct. 1276, 1280, 1281 (2006).

But the specific challenged conduct here goes far beyond what is necessary to the foregoing. It hurts consumers, efficiency and output. It does so, among other things, by inflating **aftermarket** prices above the IPO price, inflating effective underwriting charges, and sending uncompetitively determined, terrible aftermarket price signals to investors about where they should allocate their capital. Whether the collusive conduct here is ultimately judged under the *pro se* approach, the quick-look approach, or another point on the continuum of antitrust analysis is a matter for the trial court at a later stage of this case. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 789 (1999) ("our categories of analysis

14. Further, the antitrust laws reflect and, to an extent, accommodate stock exchanges to provide specific breathing space to carry out the Securities Exchange Act, *i.e.*, "recognizing that they can set up barriers to membership . . . " the Exchange will engage in restraints of trade that might well be unreasonable . . . ". *See Jacobi v. Bache & Co.*, 520 F.2d 1231, 1237-38 (2d Cir. 1975); 1A AREEDA & HOVENKAMP ¶ 240o3, at 12 (2d ed. 2003)("the antitrust laws can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation."); *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 241, 38 S.Ct. 242, 245 (1918) ("Every Board of Trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most enacting activity.")

are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear").

The guiding purposes of the antitrust laws - - - increasing output, promoting consumer welfare, and promoting efficiency[15] - - - are **not** identical with the federal securities laws' purposes of protecting investors and promoting capital raising, efficiency, and competition.[16]

However, contrary to defendants' argument, the purposes of the antitrust laws and securities laws **wholly overlap** and are fully congruent and complementary with respect to the prohibition of the deleterious conduct here.

Defendants' pastiched implied immunity standard should be rejected.

B. The Decision Correctly Rejected Defendants' Repeated Argument That Plaintiffs Challenge Underwriting Syndicates And, Therefore, Raise A Conflict Between The Securities And Antitrust Laws

Defendants repeatedly misconstrue plaintiffs' complaint as alleging to be unlawful under the antitrust laws either underwriting syndicates generally, or these defendants' specific underwriting syndicates.

On the basis of this misconstruction, defendants repeatedly argue and re-argue that the antitrust laws and securities laws are in conflict. Brief at 5-8, 15-16, 45-48. Plaintiffs do not make any claim that syndicates generally or here are unlawful. *Compare* A *supra* (joint venture syndicates and their proper ancillary restraints may be lawful under the antitrust laws). Therefore, as the Court of Appeals found, plaintiffs do not attack defendants' syndicates. Pet. App. 61a

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15. *E.g.*, *National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 107-08 (1984).

16. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360-61 (1991).

n. 47. Defendants' repeated arguments to the contrary (Brief at 3-8, 27-34, 37-38 and 48), are simply wrong.

Plaintiffs do allege that these particular defendants at various times (including during their specific syndicate activities), did discuss tie-in laddering agreements and their effects on prices; did agree to work together to impose same; and did work together jointly to impose on customers such agreements. C¶¶ 5 – 8, 38 - 64; JA 12-14, 25 - 31. By abusing their time together in the syndicates to agree to require laddering and tie-ins, defendants violated the securities laws. If plaintiffs prove this abuse, then plaintiffs will be proving conduct that definitely violates the securities laws and is probative of an agreement to fix prices and charges in violation of Section 1 of the Sherman Act.

C. Defendants' "Doubly Prohibited" Immunity Argument Fails

Defendants assert that the United States and plaintiffs "have it backwards" because two decisions outside the long line of antitrust immunity rulings by this Court (*see* Point I, D) have supposedly found immunity for conduct that was statutorily prohibited by both the antitrust and the regulatory law. Brief at 44-45, *citing* to *Brown v. ProFootball*, 518 U.S. 231 (1996) ("*Brown*") and *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963). ("*Pan American*").

Brown refutes defendants' position. In *Brown*, this Court "assumed that such conduct, as practiced in this case, is unobjectionable as a matter of labor law and policy. On that assumption, we conclude that the [antitrust] exemption applies." 518 U.S. 238. Thus, the express basis for the decision in *Brown* was that the conduct was lawful under the regulatory statute. Moreover, the legislative history of the labor law expressly indicated that there **was** to be an antitrust immunity for the conduct. *Id.* at 237-239.

Pan American also refutes defendants' position. First, antitrust damages claims (such as made here) and other civil claims were **not immunized** from the antitrust laws by this Court. *Compare Pan American*, 371 U.S. at 306 *with Hughes Tool Co. v. Transworld*, 409 U.S. at 410. Second, the Civil Aeronautics Act ("CAA") was promulgated in pre-war conditions in 1938 and granted numerous express antitrust exemption powers to the Civil Aeronautics Board ("CAB"). Third, the CAA expressly entrusted the President, not the Courts, with the review of certain parts of the "national defense" sensitive rulings by the CAB of the airline industry: "Competition among air carriers is being carried to an extreme, which tend to . . . render unsafe a transportation service . . . [that is] required in the public interest, in the interest of the Postal Service and of the national defense". 371 U.S. 301, *quoting* from the legislative history. Fourth, there was, unlike here no legislative history indicating that the very conduct at issue motivated the passage of the regulatory legislation nor were there repeated prosecutions of the express conduct similar to that challenged in *Pan American*. Fifth, the CAA had many powers to issue antitrust exemptions. *Id.* at 305.

In the foregoing context, this Court held that the CAB, not the Courts, had to determine injunctive relief and supervise any on-going potential break up of an airline joint venture as Congress intended. *Id.*

D. Defendants' Policy Arguments Are Inappropriate In This Forum And Wrong

1. Treble Damages Are Compensatory Not Punitive

Contrary to defendants (*see* Pet. Brief, p. 39), this Court has consistently upheld treble damages not as punitive in nature, but rather as serving compensation and deterrence. *E.g.*, *Atlantic Richfield Co. v. USA Petroleum*, 495 U.S. 328, 330 (1990); *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989). Treble damages have been asserted to be commensurate to the total

actual damages caused by the alleged violations[17], which, in practice, are difficult to detect[18] and prove.

2. Antitrust Laws Or Restraint Of Trade Laws Have Been Beneficially Prosecuted Against Conduct In The Securities Markets For Centuries

Prior to and since the enactment of the federal securities laws, restraint of trade and antitrust claims have been enforced against manipulators of securities prices for over two hundred years.[19] These claims have repeatedly been

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17. *See* Robert H. Lande, *Are Antitrust Damages Really Single Damages?*, 54 Ohio St. L.J. 115 (1993) arguing that added variable costs result in a damages calculation that is at most single damages when compared to the full harm, *i.e.*, the costs to plaintiffs to litigate, the costs to the judicial system to handle the case, the allocative inefficiencies of market power as well as basic tax effects.

18. Peter G. Bryant & E. Woodrow Eckard, *Price Fixing: The Probability of Getting Caught*, 48 Rev. Econ. & Stat. 531, 531-36 (1991).

19. *Sampson v. Shaw*, 101 Mass. 145 (1809); *Livermore v. Bushnell*, 12 N.Y. Sup. Ct. (5 Hun.) 285 (1885) (condemning and enjoining agreement to inflate stock prices as an unlawful restraint of trade). *See also Pirnie Simons & Co., Inc. v. Whitney*, 144 Misc. 812, 259 N.Y.S. 193 (Sup.Ct. N.Y.Co. 1932) (under New York's antitrust statute, the Donnelly Act, enjoining *pendent lite* New York Stock Exchange from enforcing rule prohibiting its members from selling "packaged" securities to non-members); *Fisher v. Bush*, 42 N.Y.Sup.Ct. (35 Hun.) 641 (1885) (condemning certain types of collective restraints of stock sales); *Ridgely v. Keene*, 134 App. Div. 647, 119 N.Y.s. 451 (2d Dept. 1909) (court refused to enforce illegal contract to drive up price of security); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (although exchange members were empowered to communicate with each other and create rules and by-laws governing their conduct, immunity not implied for anticompetitive action requiring disconnection of private telephone wires from plaintiff to member brokers); *In re Nasdaq Market-Makers Antitrust Litig.*, 894 F.Supp. 703 (S.D.N.Y. 1995) (upholding allegations of Section 1 conspiracy to inflate the charge for market-making services); *United States v. Alex. Brown & Sons, Inc.*, 963 F. Supp. 235 (S.D.N.Y. 1997) (same); *see infra* re the many beneficial effects of these prosecutions; *Dillard v. Merrill Lynch, Pierce, Fenner*

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brought against: collusive conduct on securities exchanges and commodities exchanges, *United States v. Patten*, 226 U.S. 525 (1913); *Board of Trade of City of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236 (1905); *Strobl v. New York Merc. Exch.*, 768 F.2d 22 (2d Cir. 1985). Since the passage of the federal securities laws, antitrust claims have been brought against collusive conduct by brokers to inflate their underwriting charges for certain types of initial public offerings, *In re Public Offering Fee Antitrust Litig.*, 2004 WL 350696 (S.D.N.Y. Feb. 25, 2004) (upholding Section 1 claim that investment banks (who are also defendants here) inflated their underwriting charges for certain offerings), and *U.S. v. Morgan*, *supra*, or their market-making charges for aftermarket trading. *Nasdaq*, *supra*. Also during this time, antitrust claims have been brought against collusive conduct by investment banks to boycott or divide markets, or make collusive bids for securities. *Id.*; *see* n.19, *supra*.

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& Smith, Inc., 961 F.2d 1148 (5th Cir. 1992) (no antitrust immunity for Section 1 boycott claim against brokerage firms which offered services in contracts containing the same mandatory arbitration clause); *United States v. Morgan*, 118 F.Supp. 621 (S.D.N.Y. 1953) (government failed to prove that leading investment banks agreed to divide markets and refrain from competing for customers); *United States v. Salomon Bros., Inc.*, 57 Fed. Reg. 29,743 (1992) ("*Salomon*") (the DOJ charged that defendants conspired to amass substantial positions (reaching 100%) in the May 1991 notes; Salomon agreed to pay $290 million, including $135 million to the DOJ and the SEC, $55 million to the DOJ's asset forfeiture fund, and $100 million to a victim compensation fund); United *States v. Steinhardt Management Co. & Caxton Corp.*, 1995 WL 10627 (DOJ Notice, Jan. 13, 1995); collusive bids restrain trade in certain Treasury notes); *United States v. Salomon Bros., Inc.*, 57 Fed. Reg. 29,743 (1992) (same); *Peterson v. Philadelphia Stock Exchange*, 717 F. Supp. 332, 335 (E.D. Pa. 1989) (trader's claim that the exchange and a securities firm conspired to blacklist him from the securities market was not immune from the Sherman Act; court found that the alleged conspiracy was beyond the regulatory authority of the SEC, and thus not immune from the antitrust laws).

These prosecutions have had beneficial effects: *See* Kaplan, *Antitrust As A Public-Private Partnership: A Case Study Of The Nasdaq Investigation*, 52 Case Western Reserve L. Rev. 111 (1999); *Nasdaq*, 187 F.R.D. 466 (S.D.N.Y. 1998); *U.S. v. Alex Brown & Sons, Inc.*, 963 F. Supp. 235, 239 (S.D.N.Y), *aff'd*, 153 F.3d 16 (2d Cir. 1998).

> In addition to the considerable benefit conferred upon the class members, there is also an appreciable benefit to the public in this case. Meritorious class actions, such as the present action, promote private enforcement of, and compliance with, the antitrust laws. Indeed, Class Counsel report that **spreads are now 41 percent lower than they were at the start of this action**.
>
> The role of Class Counsel was critical, not only in achieving the significant [$1.027 billion] recovery, but in framing the issues which became the subject of the civil investigative demands of the Antitrust Division of the Department of Justice. **This Class action litigation was the foundation stone for the consent decree which ended the practices complained of.**

In re Nasdaq Market-Makers Antitrust Litig., 187 F.R.D. 465, 487-88 (S.D.N.Y. 1998) (emphasis supplied).[20]

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20. Calkins, An Enforcement Official's Reflections on Antitrust Class Actions, 39 ARIZ. L. REV. 413, 422 (1977) (then-general counsel of the Federal Trade Commission noting that "NASDAQ did not follow a prior governmental investigation. Indeed, the private action appears to have **triggered** the governmental activity." [emphasis supplied]); John C. Coffee, Jr., Adolph A. Berle Professor of Law at Columbia Law School and member of the Legal Advisory Board to the *amicus* National Association of Securities Dealers, stated that not only did private plaintiffs "awake the federal government to . . . price collusion that the government had previously ignored," but also pulled "the principal laboring oar in advancing this case." Affidavit at ¶ 24, *In re*

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When, as here, parties have engaged in conduct that violates Congress' prohibitions in both the antitrust laws and regulatory laws, parallel or joint prosecutions of such conduct under both statutes has frequently proceeded to beneficial effect.[21] This

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Nasdaq Market Makers Antitrust Litig., M.D.L. No. 1023, 94 Civ. 3996 (RWS) (S.D.N.Y. 1998). Paul Schultz, co-author of William Christie & Paul Schultz, Why Do NASDAQ Market Makers Avoid Odd-Eighth Quotes?, 49 J. FIN. 1813 (1994), concluded that "I have no doubt that neither the settlement, nor the lasting improvement in Nasdaq spreads, would have occurred in the absence of the vigorous and creative prosecution of the class action. . . . I believe, from my conversations with him, that Professor Christie is of the same opinion." Affidavit at ¶ 6, *In re Nasdaq Market Makers Antitrust Litig.*, M.D.L. No. 1023, 94 Civ. 3996 (RWS) (S.D.N.Y. 1998).

21. *United States v. Salomon Bros., Inc.*, 57 Fed.Reg. 29,743 (1992) (government antitrust enforcement action); *Three Crown Ltd. Partnership v. Salomon Bros., Inc.*, 1995 WL 422467 (S.D.N.Y. July 14, 1995) (private antitrust action); *Compare In re Nasdaq Market-Makers Antitrust Litig.*, 894 F.Supp. 703 (S.D.N.Y. 1995) (private antitrust action) *and United States v. Alex. Brown & Sons, Inc.*, 963 F.Supp. 235 (S.D.N.Y. 1997) (government antitrust enforcement action) *with In the Matter of Certain Market Making Activities on the NASDAQ*, Exchange Act Release No. 34-40900, 1998 WL 919673 (Jan. 11, 1999) (SEC prosecution of wrongdoing similar to that in the antitrust case) *and Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001); *Compare* SEC order (beneficial effect) *with* DOJ (beneficial effect) and *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003) (civil settlement upheld but immunity also upheld). In its submission in this case to the court below, the DOJ twice took exception to the *Exchange Options* immunity standards as incorrectly implying immunity where Congress intended none. Pet App. 203a [illegible], 207a n. 8; *Strobl v. New York Mercantile Exchange*, 768 F.2d 22, [illegible] (2d Cir. 1985), *cert. denied sub nom. Simplot v. Strobl*, 474 U.S. 1006 (1985); *Minpeco v. Hunt*, 718 F. Supp. 168 (S.D.N.Y. 1989).

In *Nasdaq*, defendants' bids and offers created an overall wide spread across different market-makers and different securities, which increased defendants' effective charge to customers and violated Section

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includes collusive activity to rig bids, to widen the charges that intermediaries extract for purchasing and selling securities, to divide securities markets, or to manipulate and fix the price of an item or commodity.

3. Antitrust Prosecutions Of Conduct In The Securities Markets Have Promoted Capital Raising But Defendants' Deleterious Practices And Overcharges Chill Capital Raising

Reduced transaction costs in trading securities and better compliance resulting from the *Nasdaq* antitrust prosecution have aided capital raising and reduced the "capture" of the regulators by the regulated. *Compare Order Execution Obligations*, 61 F.R. 48290 (SEC Sept. 12, 1996) (adopting Rules promulgated under 11Ac1) and *In the Matter of National Association of Securities Dealers, Inc., Order Instituting Public Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions*, 1996 WL 447193, Rel. No. 34-37538, (SEC Aug. 8, 1996) (SEC proceeding, which also grew out of private and government antitrust enforcement actions, **re-organized the *NASD*** for better compliance; helped investors and capital raising in ways that extended far beyond the dramatic reductions in Nasdaq market-maker spreads); *with*, Prof. George J. Stigler, *The Theory of Economic Regulation*, p. 1 ("regulation is acquired by the industry and is designed and operated primarily for its benefit," but outside influences as here, can reduce this "capture" of the regulator by the regulated).

However, defendants' collusive inflation of prices to unsustainable levels and inflation of their underwriter charges

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1 of the Sherman Act. *In re Nasdaq Market-Makers Antitrust Litig.*, 894 F. Supp. 703 (S.D.N.Y. 1995). Similarly, defendants' alleged conspiracy profited by creating a wide spread across underwriters and IPOs, between the IPO price and the immediate aftermarket prices in order to increase defendants' effective charge to customers. C ¶¶ 1, 6, 7, 42, 62; JA 11-13, 26, 30.

hurts capital raising. *See* THE COST OF CAPITAL: AN INTERNATIONAL COMPARISON (JUNE 2006), commissioned by the London Stock Exchange ("LSE") and the City of London Corporation from Oxera Consulting Ltd. at 4-5, available at *www.oxera.com/cmsDocuments/Reports/Cost* of Capital_an international comparison.pdf.' (finding that (1) "issuing equity on the London markets is cheaper than on NYSE or Nasdaq, mainly because of the systematically higher underwriting fee charged for US transactions"; (2) underwriting fees averaged 3-4% on European exchanges but were "significantly higher" on US transactions, averaging 6.5-7%; (3) professional fees for legal, accounting and advisory services "in London tend to be higher than in Frankfurt and Paris, but not as high as in New York."). Contrary to defendants' attacks, this report makes no mention of litigation or class actions, let alone antitrust claims, as burdening or capital formation underwriting in the United States.).

CONCLUSION

For the foregoing reasons and authorities, respondents Glen Billing, *et al.*, respectfully submit that this Court should affirm the judgment of the court of appeals in all respects. In the alternative, the Court should remand with leave to replead the complaint.

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Respectfully submitted,

CHRISTOPHER LOVELL
Counsel of Record
GARY S. JACOBSON
WRITER C. CLAYTON
IMTIAZ A. SIDDIQUI
EDWARD Y. KROUB
CHRISTOPHER M. MCGRATH
LOVELL STEWART HALEBIAN LLP
500 Fifth Avenue
New York, New York 10110
(212) 608-1900

MELVYN I. WEISS
MILBERG WEISS & BERSHAD LLP
One Pennsylvania Plaza
New York, New York 10119
(212) 594-5300

RICHARD S. SCHIFFRIN
SCHIFFRIN BARROWAY TOPAZ
& KESSLER LLP
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

HOWARD B. SIROTA
SIROTA & SIROTA LLP
110 Wall Street, 21st Floor
New York, New York 10005
(212) 425-9055

FRED TAYLOR ISQUITH
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
270 Madison Avenue
Ninth Floor
New York, New York 10016
(212) 545-4600

Counsel for Respondents Glen Billing, et al.

Additional Counsel for Respondents

J. Douglas Richards
Pomerantz Haudek Block
Grossman & Gross LLP
100 Park Avenue
New York, New York 10017
(212) 661-1100

Einer Elhauge
1563 Massachusetts Avenue
Cambridge, Massachusetts 02138

Jonathan R. Macey
27 Rimmon Road
Woodbridge, Connecticut 06525